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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PEDRO AVINA, Defendant and Appellant.	B206195 (Los Angeles County Super. Ct. No. BA304671)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael E. Pastor, Judge. Affirmed as modified.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Pedro Avina (defendant) of second degree murder (count 1) (Pen. Code, § 187)[1] and two counts of attempted murder (counts 2 and 3) (§§ 664/187, subd. (a)). The jury found true with respect to all counts that defendant personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d).

The trial court sentenced defendant to a total term of nine years and 65 years to life in state prison. The sentence consisted of the following: in count 1, 15 years to life for the second degree murder and a consecutive 25 years to life for the firearm enhancement; in count 2, a consecutive term of nine years and a consecutive 25 years for the firearm enhancement; and in count 3, a concurrent term of nine years and 25 years to life for the firearm enhancement.

Defendant appeals on the grounds that: (1) the police interviews of David Avina, Angelica Avina, and Anna Gutierrez should have been suppressed because they were coerced and involuntary; (2) the prosecutor repeatedly committed misconduct during argument; (3) the imposition of upper term sentences in count 2 and count 3 violated defendant's federal constitutional rights to a jury trial, proof beyond a reasonable doubt, and due process; and (4) the trial court erroneously imposed a $5,000 state court construction penalty on a restitution fine without statutory authority.

We affirm the judgment with modification.

FACTS

Prosecution Evidence

Theft of Herman Minken's Revolver

On January 25, 2006, Herman Minken (Minken) hired Ricardo Sepulveda (Sepulveda) to install new carpeting in his Los Feliz apartment. Sepulveda brought along his brother-in-law, defendant, as a helper. Minken described defendant as 18 to 19 years old, Hispanic with a slight build. Prior to the carpet installation, Minken had secreted his loaded silver .357 magnum Star Ruger revolver in the kitchenette.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

After the job was completed and the workers were gone, Minken discovered that his gun was missing. After Minken asked Sepulveda about the gun on the following morning, Sepulveda asked defendant, and defendant denied he had taken it. Minken eventually filed a police report.

The Shooting

On the evening of February 11, 2006, at approximately 8:30 p.m., defendant left his aunt's home with his cousin, Anna Gutierrez (Anna), and his two sisters, Angelica Avina (Angelica) and Juanita Avina (Juanita). They stopped at a house on their way to a King Taco restaurant. Defendant knocked on the door and then spoke with someone in the house. Defendant left the house with a bicycle. He had also obtained some marijuana. They all returned to the aunt's house at approximately 9:30 p.m.

Nicholas Davis (Davis) knew defendant from seeing him talk to Davis's stepfather, Sammy Murillo (Murillo). On the evening of February 11, 2006, defendant came to Davis's and Murillo's home and asked Davis if he could use Murillo's bicycle, a red Schwinn. Davis let defendant use it but asked him to return it that same night. The bicycle was inside the house, and Davis brought it out to defendant. Defendant never returned the bicycle, and Davis never saw defendant again. At trial, Davis identified a photograph of a bicycle as his stepfather's bicycle.

On the same evening, Nora Gonzalez (Gonzalez) was driving home in her Chevrolet Tahoe truck with her brother, Daniel Garcia (Garcia), Garcia's wife, and Garcia's nephew, Alexander Carillo (Carillo). Gonzalez stopped her truck near the Famsa store on McDonnell Avenue because Carillo and Garcia saw their friend, Krook, standing with a group of 10 to 12 males. Among the group were Efrain Villegas (Efrain), Edgar Villegas (Edgar), and Miriel Santos (Santos), who had been playing basketball and drinking. Jaime Carrasco (Carrasco), who had been with the group, was across the street.

Carillo got out of the Tahoe and greeted Krook. Garcia followed Carillo out of the Tahoe. A few seconds after Garcia got out of the truck he heard someone say, "Where you from? This is TE." "TE" stood for the Too Evil tagging crew. Garcia turned and saw that a young man, later identified as defendant, had spoken. Defendant was standing

with a bicycle between his legs. Defendant next said, "Fuck TGF." TGF was also known as TGFC. The initials stood for The Good Fellas Crew and Today's Greatest Fear Crew. TE and TGF were rival tagging crews.

Garcia approached within three feet of defendant and said, "What?" Defendant pulled a long-barreled revolver from the right side of his waistband and pointed it at Garcia's face. Defendant said, "What's up now?" Garcia grabbed the gun barrel and tried to take the gun from defendant, but his hand slipped. Defendant was able to pull back and keep the gun.

Defendant began to walk away, and Carillo told him to put the gun down if he wanted to fight. Defendant said, "Fuck you guys." Carillo was angry and he began to approach defendant, but Krook and Carrasco held him back. Efrain got in front of defendant and pushed defendant's gun hand down. Defendant began to walk away with the bicycle between his legs and said to Carillo, "Fuck you. You're not doing anything. You are a bitch." Defendant and Carillo exchanged statements that sounded like they were from tagging crews or gangs. Defendant put the gun away. Carillo told defendant to put down the gun and they would fight.

Defendant rode the bicycle until he was approximately 25 feet away. He turned and pointed the gun over his left shoulder at Carillo. He said, "I'm going to give three seconds and something is going to happen." He counted to three and fired three shots. The first shot hit Carillo in the leg. He walked a few steps and fell. The second shot hit Santos, who fell to the ground. The third shot did not hit anyone. All three shots were aimed in Garcia's general direction. Efrain called 911. Neither Carillo nor Garcia had any weapons.

Someone picked up Carillo and he was taken to the hospital and treated for his wound. The bullet had narrowly missed the main artery of his left thigh. Paramedics arrived and took Santos to the hospital. He was dead on arrival. A subsequent autopsy determined that the cause of death was a gunshot wound that entered the right side of the chest and traveled through the liver and heart leading to a rapid death. The bullet was recovered from his body.

The Investigation

Investigating officer, Detective Paul Fournier photographed a bicycle at the scene. Police found no shell casings or bullets, and Fournier explained that a semiautomatic pistol would have left spent shell casings on the ground. Fournier interviewed several witnesses on the day after the shooting. Carillo told the detective that the shooter was from TE and that in 2005 he himself had been from TGF. Carillo said that some tagging crew members acted like gang members. Garcia said he had been a member of TGF. Efrain admitted he was a tagger.

Carillo, Garcia, and Carrasco all described the shooter as a lighter skinned Hispanic who weighed approximately 140 to 150 pounds and who wore a black hooded sweatshirt. He was approximately five feet, seven inches to five feet, nine inches in height, and he appeared to be between 17 to 19 years old. He had a mustache and goatee. Efrain and Carrasco had seen defendant previously. Garcia knew defendant because they had both attended the same continuation school.

Both Garcia and Carillo confirmed to the detective that there was a code against snitching among taggers. One reason for not snitching was the fear of retaliation against the person who snitched or against that person's family.

In March 2006, Detective Fournier showed Carillo a photographic lineup (six pack) containing defendant's picture. Carillo quickly glanced at the pictures and then pushed the six-pack back to the detective. At trial, Carillo said he was not reluctant to identify defendant but he was not able to identify his picture because he did not get a good enough look at the shooter.

When Garcia was shown the six-pack, he stared at defendant's photograph but said he did not recognize anyone. At trial Garcia said he recognized defendant because they had gone to school together. However, he had not seen the shooter's face well enough to identify him as defendant.

During Detective Fournier's second interview with Carrasco on March 7, 2006, Carrasco selected defendant's picture from the six-pack. At his second interview on March 16, 2006, Efrain identified defendant in the six-pack as the shooter.

A firearms examiner determined that the bullet in Santos's body was most likely fired from a .38 Special or .357. It could have been fired from a Smith & Wesson, Ruger, or Taurus. Cartridge casings were normally not found after a revolver is fired.

Detective Fournier learned that the manager of the North Kern Apartments had an accurate surveillance system for the complex. He obtained the video of the front of the complex from the date of the shooting. Fournier also obtained records showing that defendant's aunt, his mother, and his cousin, Anna, were living in the apartment complex. The video showed four people leaving the apartments at around 8:30 p.m. and returning around 9:33 p.m. The apartments are 1.3 miles from the shooting scene. Fournier was initially suspicious of defendant's brother, David, because the video showed him returning at 9:15 p.m. with a bicycle and later going to his friend's apartment with the bicycle after having changed clothes. Fournier interviewed David and some of his relatives and videotaped the interviews.

Defendant's older brother, Manuel, visited him in jail in April 2007 and their conversation was recorded. The audiotape was played for the jury. Manuel told defendant he would tell Anna or someone else to say that they went to King Taco and that they saw another man on a bicycle pass them by. Manuel had told Angelica and Anna to say that they went to buy marijuana. Defendant told Manuel to tell "her" to say he was wearing a black jacket and he left it in her house.

Detective Fournier also recorded defendant's telephone calls. Defendant sent a message to Manuel to tell Davis not to go to court. Defendant said that "they" were talking to Sepulveda and the "old guy" and would have them go to court.

At trial, Manuel denied that defendant had asked him to talk to some of the witnesses. He denied some of the other remarks he made that had been recorded.

Testimony of David Avina, Angelica, and Gutierrez

David Avina (David) testified that his sister, Lisa, was married to Sepulveda. At trial David stated he did not remember telling detectives that his sisters and defendant went to King Taco that night or that the girls came home crying. He did not remember telling detectives that defendant admitted to committing the shooting and that defendant

was from TE and his enemies were TGF. He said he was pressured by the detectives into making statements. They told him he would get life in jail. They forced him to say who committed the shooting. He named defendant because "they wanted me to." He said the officers stopped him as he left for school the morning of the interview, pushed him against the hood of the patrol car, and put him in handcuffs.

In the video of David's interview, he admitted that he saw defendant with a revolver earlier on the day of the shooting. He said that defendant, Anna, Angelica, and Juanita left for King Taco, and David later went there to look for them. They were not there. When they returned, the girls were crying. David overheard the girls asking defendant why he pulled the trigger. Defendant said he had to because "the guys were stepping up to me." David asked defendant why he did it. Defendant said, "I had to do it, bro. I wanted to go there all day." He said, "just drop it little bro . . . I love you and everything, I just can't tell you what happened."

Angelica, defendant's sister, testified that she did not remember what she said during the interview. She said that she, Anna, Juanita, and defendant went to King Taco that night but found it crowded. She denied that the group stopped at a friend's house or that defendant told her he had shot someone. She later admitted that the group waited for defendant when he stopped at a house. She denied that she and her sisters cried as they ran back to their apartment that night, that defendant admitted to shooting someone, or that defendant was called "Chaos." She admitted telling detectives that defendant did not get along with someone from TGF, but she said she lied to the police.

In her taped interview, which was played to the jury, Angelica said that defendant was involved in an incident in which, he said, he had been rushed by someone. She said that defendant was a TE member known as Chaos.

Anna testified that she went to King Taco with defendant, Angelica, and Juanita on the night of the shooting. They stopped at a house to buy marijuana. Anna did not remember telling detectives that the group ran back to the apartment or that defendant committed the shooting. She did not remember saying he had shown her a revolver. She

acknowledged that she identified herself, defendant, Angelica, and Juanita in the surveillance video, which showed them leaving at 8:36 p.m. and returning at 9:33 p.m.

In Anna's taped interview with the detectives, which was played for the jury, Anna said that defendant obtained a bicycle from the man at the house and left the group for approximately 15 minutes. When defendant returned he was running and did not have the bicycle. He told the girls to run. Defendant told them he fired the gun but did not know if he hit anyone. Defendant told her that the guys who were there were his enemies.

Carrasco identified defendant in court as the shooter. Efrain also identified defendant in court. Efrain feared for his safety and that of his family because of his testimony.

At trial Davis said he was not sure that defendant was the person who borrowed the bicycle. He admitted he had been certain of his identification of defendant in the six-pack. Davis admitted to being a former tagger. Detective Fournier confirmed Davis's photographic identification of defendant.

Los Angeles County Sheriff's deputy, Ignacio Luna, testified as an expert on gangs and tagging crews. Although tagging crews were not violent in the 1980's, gangs began to show them disrespect in the 1990's because of geographical disputes. Tagging crews were permitted to exist only if affiliated with a gang. Crew members began assimilating gang culture and using weapons. A "tag banger" was someone who used gang symbols in graffiti. A confrontation would result if a tag banger saw a rival because he would be expected to defend his crew. If a tag banger showed a gun he would be expected to use it to avoid being labeled a coward.

Defense Evidence

Gonzalez testified that she drove her Tahoe to 700 South McConnell with Carillo, Garcia, and her two daughters, Martha and Irene, on February 11, 2006. She stopped the car so that Carillo could greet some friends, and Carillo and Garcia got out. One of her daughters screamed that someone had a gun. She saw a man with a black hooded sweatshirt pointing a gun at Carillo and Garcia and she saw him point a gun at Garcia's

head. Gonzalez heard gunshots and saw Carillo fall. The shooter was on a bicycle and went toward Whittier. She saw three people leaving.

Irene and Martha testified that they saw one person with a gun. He was wearing a black sweatshirt and holding a bicycle. Irene saw someone leaving on a bicycle as the Tahoe was driven away. She was not sure if it was the same person who had the gun. Neither Irene nor Martha recalled telling Detective Fournier that there were two people with guns.

On February 11, 2006, Santiago Ojeda (Ojeda) was standing on the balcony of his apartment on South McDonnell Avenue. He saw a man get out of a car that double-parked across the street. The man removed his jacket and lifted his hands above his head. Brian Martinez (Martinez) was there, and he lifted his shirt. Carrasco said something to Ojeda and then went toward the encounter. As Ojeda went back inside, he heard gunshots.

Ojeda acknowledged that he had told police previously that he had not seen anything. He did not speak to anyone until a defense investigator spoke with him in January 2007. He believed the photograph of defendant that he had been shown looked like Martinez, except for the scar.

Detective Fournier spoke with Carrasco about Martinez. Carrasco said that Martinez was not involved in the shooting and was not close to the shooter or the victims. Fournier remembered either Irene or Martha telling him that there was a second man in the crowd who may have had a gun.

Juanita, defendant's sister, testified that she went with defendant, Angelica, and Anna to buy marijuana on the night of the shooting. She did not remember where they stopped or what happened there at first. She then remembered that defendant went inside a house for several minutes. Juanita said they got a pizza before they went home. She did not recall that she was crying. She said that she, Angelica, and Anna were high. Neither defendant nor David told her that defendant had shot someone.

Edgar did not recall any bicycles in the area of the shooting. He told detectives that Arthur Martinez had ridden a bicycle there earlier in the day. Edgar heard three or

four gunshots that day when he was near his house. He was too far away to see the shooter. He heard someone yell "TGF." Edgar did not remember telling detectives that he saw the shooter pull out a silver gun. He did tell detectives the truth.

Benjamin Avina (Benjamin), age 14 at trial, testified that the police picked him up as he was going to school along with his brother, David. The police kept them without their mother being there. The police threatened him by saying they were going to "put [his] brother to life." Benjamin began to cry during his testimony. He said he had felt pressured to say who was shooting. He saw David crying. Benjamin had not heard anything from David or his sisters about Peter shooting anyone. On cross-examination, he said that the video tape that captured him talking with David and wherein David tells him not to say anything was referring only to sports. The prosecutor played the video of Benjamin's interview, and asked Benjamin afterward why he was laughing while the video was played for the jury. Benjamin acknowledged that he was laughing while he was in the room with his brother also.

Rebuttal Evidence

The first 911 call regarding the shooting was received at 9:15 p.m. According to the 911 manager, the system was set to an atomic clock and was very accurate.

Detective Fournier did not interview Ojeda at the time of the shooting because the police report stated Ojeda did not witness the shooting. At one point the detective showed a six-pack lineup to Ojeda. Ojeda asked if defendant was Brian Martinez.

Detective Fournier tried to interview Juanita at school, since she was not home when he interviewed the rest of the family. Juanita said she had spoken to a lawyer and did not have to speak to the detective.

DISCUSSION

I. Trial Court's Admission of Police Interviews of Certain Witnesses

A. Defendant's Argument

Defendant contends the trial court prejudicially erred when it admitted the recordings and transcripts of the police interviews of David, Angelica, and Anna because police made threats against these witnesses in order to coerce them and overcome their

will. The trial court deprived defendant of his constitutional right to due process and a fair trial when it denied his motion to suppress these statements on the basis that they were false and involuntary.

B. Proceedings Below

Defense counsel filed a motion to suppress the coerced statements of the three minor witnesses. After hearing argument, the trial court denied the motion. It found there was no coercion in the interview of David Avina, who was 15 at the time. The interview was a little over an hour, and the officers did not engage in any kind of threatening behavior. The officers acted responsibly and reasonably when they followed up on David's denials and confronted him with certain information in an effort to elicit the truth. David validly waived his *Miranda* rights,[2] and the use of deception as an interrogation technique is not necessarily improper and was not in this case. The trial court found that David's statements were voluntary and his due process rights were not violated.

With respect to Angelica, who was 16 at the time of the interview, the trial court did not believe there were threats or express or implied promises made during the interview. Angelica acknowledged at the preliminary hearing that she did not feel coerced. Her interview was not prolonged. The trial court found that Angelica's will was not overborne, and there was no violation of due process.

Anna was also 16 when interviewed, and she said at the preliminary hearing that the detectives did not tell her to make a statement implicating defendant. Her interview was not prolonged and not coercive, even though she was challenged by officers at times. There was no effort to have her say something improper or false in an effort to satisfy the police. Her free will was not overborne and there was no violation of due process.

C. Relevant Authority

A defendant may assert that the prosecution violated his due process right to a fair trial by using a coerced third-party statement against him. (*People v. Jenkins* (2000) 22

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2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Cal.4th 900, 966; *People v. Badgett* (1995) 10 Cal.4th 330, 344, 347-348; *People v. Lee* (2002) 95 Cal.App.4th 772, 781.) The defendant bears the burden of proving that the statement was involuntarily obtained. (*People v. Douglas* (1990) 50 Cal.3d 468, 500.)

If there is conflicting evidence regarding the alleged coercion, we must accept the version most favorable to the People, to the extent supported by the record; however, if the facts are not in dispute, we review the record de novo to determine, based on the totality of circumstances, whether the statement was voluntary. (*People v. Badgett*, *supra*, 10 Cal.4th at pp. 352-354; *People v. Anderson* (1990) 52 Cal.3d 453, 470; *People v. Lee*, *supra*, 95 Cal.App.4th at p. 781.) We consider both the characteristics of the witness and the details of the encounter. (See *People v. Neal* (2003) 31 Cal.4th 63, 80.)

"The statement of a . . . witness is coerced if it is the product of police conduct which overcomes the person's free will." (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 782, fn. omitted; see also *In re Walker* (1974) 10 Cal.3d 764, 777.) In determining whether the person's free will was overcome, a reviewing court looks to the totality of the circumstances, including the person's age, sophistication, emotional state, and prior experience with the criminal justice system as well as whether the interrogation involved deception, threats, or promises of leniency. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208-212.)

D. Evidence Properly Admitted

We agree with the trial court that the transcripts and recordings of the witness interviews, which we have viewed and heard, reveal no coercion on the part of the detectives. We have summarized their statements in the facts portion of this opinion.

In Anna's case, the detectives made no threats, express or implied. It is true that she sometimes changed her story to conform to Angelica's when the detectives pointed out a discrepancy, but this does not signify that she was coerced, and indeed she did not always do so. Anna's mother was present and was welcomed by the detectives. She asked the detectives questions and received answers. Anna answered the questions in a straightforward manner. There is no indication she was coerced. The detectives never departed from a conversational tone and accepted Anna's lapses of memory without

pressuring her. In addition, when making its ruling, the trial court had before it the preliminary hearing transcript wherein Anna acknowledged she had not been coerced.

There were no threats or promises made during Angelica's interview either. Detective Tomlin told Angelica that David was in a tough spot, and she could help him out. He told Angelica that some people said the shooting was cold blooded and some said someone rushed her brother. Angelica said Peter told her someone rushed him and that was it. She never heard about a murder. When she insisted she knew nothing, Tomlin said someone was lying, and he was going to "go back to David." He mentioned that David had acted suspiciously by changing his clothing. Angelica said that David could never have been involved in a shooting, but, as for defendant, "I don't know," and "Different story. Like the way he is." Angelica spoke in a vague and disjointed fashion and never actually said that defendant committed the murder during her interview. She said she could not picture him doing it, but she never knew what he could do. There was clearly nothing coercive in Tomlin's method of questioning her. He never raised his voice and exhibited patience throughout the interview.

Since the detectives believed he could have been involved due to his suspicious behavior of changing clothes and looking over his shoulder, as seen on the surveillance footage, David was questioned more thoroughly. It was true that David was falsely told he had been pointed out by witnesses. However, "[s]o long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession [or statement], confessions [or statements] prompted by deception are admissible in evidence. [Citations.] Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion. [Citations.]" (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280.)

Detectives Fournier and Tomlin took care in explaining to David his *Miranda* rights. David said he understood his rights and although he did not know about it, was willing to talk about the case. David was 14 at the time, and he demonstrated that he knew right from wrong. Fournier explained to David that people had identified him as

being at the murder scene and told him that "[t]heoretically you could be charged as an adult on this case" because of the severity. Using the surveillance tape, Fournier described a scenario where David could have committed the murder. Fournier told him it looked bad because he changed clothes. Fournier also told David he did not want him to get in trouble for something he did not do. He wanted to clear David of the crime if it was not him. Fournier told David that if he had not committed the crime he would be home in about 20 minutes, but the detective had to feel comfortable David had nothing to do with it. Fournier repeatedly exhorted David to be honest. David was tearful at times, but this was not due to any change in tone or harsh language by the detectives.

"[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.]" (*People v. Jimenez* (1978) 21 Cal.3d 595, 611.) Moreover, "a 'deception which produces a confession [or statement] does not preclude admissibility of the confession [or statement] *unless the deception is of such a nature to produce an untrue statement*.'" (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 785; see also *People v. Underwood* (1964) 61 Cal.2d 113, 124.)

Although the detectives told David he could be charged as an adult if he was involved, the implied threat was significantly weakened, if not eliminated, by the detectives' continuing admonishments to David to tell the truth. Consequently, the implied threat was not likely to produce an untruthful statement.

Finally, adding to our conclusion that David's, Angelica's, and Anna's statements were not coerced is the tape itself. We have listened to the tape and note that there was little in either the conduct or the tone used by the detectives that could be considered threatening, forceful or coercive. Consequently, under the totality of the circumstances, we are persuaded that the statements were voluntarily given.

II. Prosecutorial Misconduct

A. Defendant's Argument

Defendant contends the prosecutor engaged in prejudicial misconduct by repeatedly pandering to the passion and prejudice of the jurors during argument. First, he

improperly asked the jury members to put themselves in the shoes of the police when assessing the credibility of the witnesses. Second, he repeatedly inserted irrelevant details about the victim's age at the time he was killed and argued that accountability was required for his killing. Defendant argues that defense counsel's failure to object did not result in forfeiture, since the misconduct violated a right guaranteed by the federal constitution. If the issue was indeed forfeited, then counsel provided ineffective assistance.

B. Relevant Authority

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "[W]e 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

It is improper for the prosecutor to appeal to the passion and prejudice of the jury in closing argument during the guilt phase of trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1379; *People v. Mayfield* (1997) 14 Cal.4th 668, 803; *People v. Pensinger* (1991)

52 Cal.3d 1210, 1250.) However, argument may be vigorous, as long as it is based on the evidence. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.)

Even if a defendant shows that prosecutorial misconduct occurred, reversal is not required unless the defendant can demonstrate that a result more favorable to him would have occurred absent the misconduct or with a curative admonition. (*People v. Arias* (1996) 13 Cal.4th 92, 161.)

C. Forfeiture

The record clearly shows that defendant made no objections to the remarks he sets out in his opening brief as grounds for a finding of prosecutorial misconduct. No admonishments to the jury were requested by the defense. It cannot be said that a timely admonishment early on in the argument phase would not have cured the harm defendant perceives resulted from the prosecutor's remarks. Therefore defendant cannot raise this claim on appeal. (*People v. Fierro* (1991) 1 Cal.4th 173, 212.) In any event, defendant's claims are without merit.

D. Proceedings Below

The remarks to which defendant objects were made during the prosecutor's discussion of the testimony by each of the witnesses and how his or her testimony answered the question "Who is the shooter?" In reference to Benjamin, the prosecutor said, "Benjamin Avina, why did they bring Benjamin Avina here? So he could testify that these detectives were threatening him, that they coerced statements? You know what, can you imagine if they gave you the job of investigating a murder just for one second. And you have to--they kill Miriel Santos. You have to solve that case. You have to figure out who killed him because that is justice. You want accountability for someone that killed that young man. 27 years old, and he's dead. I think we are all over that age here. He dies at 27 years old. So you want justice. You want accountability for this. So you investigate the case. How would you interview these witnesses that are lying to you? These very savvy minors, 'Oh, I don't know nothing,' who are giggling on the video telling each other about 'Don't talk, don't say nothing.' The only guy that really could not hold it together was David Avina. It got to him. Anna Gutierrez, too.

She came out with the truth. Angelica Avina, too. The guy that held it the best together is Benjamin Avina. I mean, he is pretty advanced for his age, ladies and gentlemen. You could tell that. And that's who the defense called, a kid that was laughing as he is watching the video. Part of it is because he is a kid, but he's one savvy kid. He knows what time it is. He knows what he has to do."

E. No Prosecutorial Misconduct

We conclude that the prosecutor's remarks did not constitute misconduct. It is well established that a prosecutor enjoys wide latitude during argument to describe the deficiencies in defense counsel's tactics and in counsel's version of the facts. (*People v. Bemore* (2000) 22 Cal.4th 809, 846; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) A prosecutor "'may vigorously argue his case'" in his closing statement. (*People v. Fields* (1983) 35 Cal.3d 329, 363.)

At the outset, the few instances to which defendant now objects clearly do not represent an egregious pattern of conduct that injected a high degree of unfairness into the trial and resulted in a denial of due process. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.) With respect to the victim's age, the prosecutor mentioned twice in the quoted passage that the victim died at 27 years old. He had previously mentioned Santos's age at the beginning of closing argument. These three references to the victim's age do not amount to improper argument, no more than referring to the victim as a "young man" would be improper. Santos was not a child--not so young as to render inflammatory any mention of his age. These references to Santos's age also fell far short of being a deceptive or reprehensible method of persuasion. (*Ibid.*) "The prosecutor [is not] required to discuss his view of the case in clinical or detached detail. (*People v. Hill* [(1998)] 17 Cal.4th [800,] 819 ["'A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"'"'], quoting *People v. Williams* (1997) 16 Cal.4th 153, 221.)" (*People v. Panah* (2005) 35 Cal.4th 395, 463.)

The prosecutor's request of the jury members to place themselves in the shoes of the detectives as they attempted to extract the truth from the witnesses also failed to rise to the level of misconduct. The prosecutor was obliged to counter the defense strategy of

attempting to portray the witnesses' prior out-of-court statements, which were damaging to the defense, as coerced. Because most of the witnesses were young and some were minors, the prosecutor was obliged to explain the reasons for the police using a sometimes forceful tone. Although it is improper to ask the jury members to put themselves or their family members in the shoes of the victim or the victim's family (see, e.g., *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250 [improper for prosecutor to suggest the jurors imagine their children had been victims of the defendant]), this fleeting request for the jurors to imagine the reasons for police behavior was not an appeal to sympathy or passion. Rather, it was an appeal to their common sense in order that they might understand why police deal with evasive witnesses in a certain manner. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 819 [the prosecutor may argue matters not in evidence but that are common knowledge].)

Moreover, the jury was instructed that arguments made by counsel are not evidence, and that it must decide the case based on the testimony and other evidence admitted at trial. (CALCRIM Nos. 200, 222.) The trial court told the jury that it was not to allow "bias, sympathy, prejudice, or public opinion" to influence its decision.

In sum, because no misconduct appears, and in any event a different result is not reasonably probable absent the references to the victim's age and the reasons for certain police methods, defendant's claim must be rejected on appeal. (*People v. Fields*, *supra*, 35 Cal.3d at p. 363; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. Imposition of Upper Term in Counts 2 and 3

A. Defendant's Argument

Defendant contends that the trial court prejudicially erred in imposing the upper terms in counts 2 and 3, which violated his Fifth, Sixth, and Fourteenth Amendment rights to jury trial, proof beyond a reasonable doubt, and due process. He argues that none of the aggravating factors the trial court relied upon were found true by a jury beyond a reasonable doubt, nor were they admitted by defendant. Therefore, these sentences do not comport with the guidelines set forth in *Cunningham v. California*

(2007) 549 U.S. 270 (*Cunningham*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

Defendant specifically asserts that the arguably recidivism-related factors used by the trial court fall outside the exception of *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224 because they go beyond the mere fact of a prior conviction. In addition, the trial court improperly used a juvenile adjudication in violation of *Apprendi* principles. Defendant further asserts that *Apprendi*, *Blakely*, and *Cunningham* have been incorrectly interpreted by the California Supreme Court.

B. Proceedings Below

In sentencing defendant on count 2, the trial court noted defendant's criminal history, i.e., a sustained petition for the serious and violent felony of robbery in violation of section 211 in 2003 and a conviction as an adult for receiving stolen property in violation of section 496, subdivision (a) as a misdemeanor. These convictions caused the court to conclude that defendant was a recidivist criminal whose crimes were increasing in seriousness and number. The court concluded that this justified the high term, citing *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *Cunningham* and its progeny. The trial court stated it could rely on other factors once it had conformed with *Cunningham*, and proceeded to cite other factors in aggravation, such as the fact that defendant engaged in conduct that constituted great bodily harm to others and a threat of great bodily harm (Cal. Rules of Court, rule 4.421(a)(1)), the fact that defendant attempted to dissuade Nicholas Davis from cooperating (rule 4.421(a)(6)), and the fact that defendant had engaged in a pattern of violence in this case (rule 4.421(b)(2)). The trial court found defendant's youth to be the single mitigating factor. The court found that the aggravating factors outweighed the mitigating factors and also did not justify the midterm in this case. The trial court chose the high term of nine years as the base term for count 2.

The trial court imposed a concurrent term in count 3. The trial court stated it was choosing the high term (nine years) on count 3 for the same reason it was chosen for count 2.

Defense counsel objected under the state and federal constitutions to any findings of factors in aggravation. Citing *Black II*, the trial court stated that the single aggravating factor of recidivism rendered defendant eligible for the upper term. Defense counsel objected to the use of defendant's juvenile record to establish recidivism, since a jury did not determine that case. The court replied that "Separate and apart from that juvenile adjudication, in view of the defendant's adult conviction for receiving stolen property, I would rely upon that as a separate and independent basis of recidivism and criminality to support the high base term. So while I mentioned and am relying upon both the sustained petition and the conviction for Penal Code section 496 as a misdemeanor, I am making an individual determination as to each. And my feeling is that a June 23rd, 2006 conviction for misdemeanor Penal Code section 496 is sufficient in and of itself to meet the recidivism requirement of *Black* and *Cunningham*."

C. Relevant Authority

In *Apprendi*, *supra*, 530 U.S. at page 490, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. In *Cunningham*, the court held that the version of California's determinate sentencing law (DSL) then in effect violated a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments by assigning to the trial judge, rather than the jury, the authority to make factual findings that subject a defendant to the possibility of an upper term sentence. (*Cunningham*, *supra*, 549 U.S. at pp. 292-293; *Black II*, supra, 41 Cal.4th at p. 805; *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832 (*Sandoval*).)

In *Black II*, our Supreme Court clarified that "if a single aggravating factor has been established in a manner consistent with *Blakely* and *Cunningham* -- by the jury's verdict, the defendant's admissions, or the fact of a prior conviction -- the imposition by the trial court of the upper term does not violate the defendant's Sixth Amendment right to a jury trial, regardless of whether the trial court considered other aggravating circumstances in deciding to impose the upper term. '[S]o long as a defendant is *eligible*

for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.' [Citation.]" (*People v. Towne* (2008) 44 Cal.4th 63, 75, citing *Black II*, *supra*, 41 Cal.4th at p. 813.)

Black II also held that the right to a jury trial does not apply to the determination that the defendant's prior convictions are numerous or of increasing seriousness. (*Black II*, *supra*, 41 Cal.4th at pp. 818-820; *People v. Towne*, *supra*, 44 Cal.4th at p. 75.) More recently, our Supreme Court has clarified that the right to a jury trial likewise does not extend to the determination of the aggravating circumstances that the defendant was on probation or parole at the time of the offense, or has served a prior prison term. (*People v. Towne*, *supra*, at p. 79.)

D. No Error

As noted, in January 2007, the United States Supreme Court held that California's DSL denied defendants the right to a jury trial on aggravating factors relied upon by the trial court to impose an upper term sentence and was therefore unconstitutional. (*Cunningham*, *supra*, 549 U.S. 270.) In March 2007, the California Legislature passed Senate Bill No. 40 (SB 40) (Stats. 2007, ch. 3, § 2) as urgency legislation in order to respond to the *Cunningham* decision and bring the DSL into compliance with the requirements set out in that case. SB 40 amended section 1170, subdivision (b) to provide that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice.

The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).)

SB 40 resulted in three basic changes to the procedure for imposing a determinate term of imprisonment: (1) the middle term was no longer the presumptive term in the absence of aggravating or mitigating circumstances; (2) the trial court was given broad discretion to impose the lower, middle or upper term, based upon which best served the interests of justice; and (3) the trial court was required to set forth reasons for imposing the chosen sentence, but it was not required to make findings of fact to justify the sentence chosen. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992; see also *People v. Sandoval*, *supra*, 41 Cal.4th at pp. 843-845; Cal. Rules of Court, rules 4.406, 4.420, 4.421 & 4.423.)

The trial court sentenced defendant on February 6, 2008, after SB 40 took effect. Thus, the upper term was the statutory maximum under *Cunningham*, and the trial court was not required to find facts in order to impose the upper term. Instead, the trial court was required to state reasons, and it did so. The record supports the court's stated reasons. The trial court's sentencing of defendant in compliance with the requirements of amended section 1170, subdivision (b), therefore did not violate his federal constitutional rights under *Apprendi*, *Blakely*, and *Cunningham*.

Moreover, even if *Cunningham* had applied to defendant's sentencing, there would be no error. *Black II* held that "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendants record of prior convictions." (*Black II*, *supra*, 41 Cal.4th at p. 816.) Here, it was clear that defendant's crimes were of increasing seriousness, even if he had only two prior convictions. Because his criminal history established aggravating circumstances that independently satisfied Sixth Amendment requirements and rendered him eligible for the upper term, he was not legally entitled to the middle term, and his right to a jury trial was not violated. (*Black II*, at p. 820; *People v. Wilson*, *supra*, 164 Cal.App.4th at p. 992.)

Finally, it is not settled that a prior juvenile adjudication cannot be considered as a factor in aggravation without a jury finding. Courts have recognized that a juvenile adjudication may be used to subject a defendant to sentencing under the "Three Strikes" law without running afoul of *Apprendi*. (*People v. Del Rio* (2008) 165 Cal.App.4th 439, 441; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1313-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1075; *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394.) Until we receive further guidance from our Supreme Court, we find the reasoning in these cases persuasive.[3]

With respect to defendant's arguments that the California Supreme Court has incorrectly interpreted *Apprendi*, *Blakely*, and *Cunningham*, defendant acknowledges that this court is bound by our Supreme Court's decisions in *Black II* and *Sandoval*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. Construction Penalty

A. Defendant's Argument

Defendant contends the trial court erred in imposing the state court construction penalty (Gov. Code, § 70372, subd. (a)(1)) based on the restitution fine. He argues that this portion of the sentence was unauthorized and the penalty must be stricken.

B. Proceedings Below

In imposing sentence, the trial court stated: "The defendant is to pay a state court construction fine calculated at five dollars for every $10 of non-suspended fines and fees. The total of non-suspended fines and fees is $10,060. Therefore, the state court construction fine is $5,030."

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3 The issue of whether a sentencing court may enhance an adult offender's sentence on the basis of prior juvenile adjudications without violating the offender's constitutional right to jury trial is currently before the California Supreme Court. (See *People v. Grayson* (2007) 155 Cal.App.4th 1059, review granted Dec. 19, 2007, S157952; *People v. Tu* (2007) 154 Cal.App.4th 735, review granted Dec. 12, 2007, S156995; *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted Oct. 10, 2007, S154847.)

C. Relevant Authority

Government Code section 70372, subdivision (a)(1) provides: "Except as otherwise provided in subdivision (b) of Section 70375 and in this article, there shall be levied a state court construction penalty, in the amount of five dollars ($5) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ."

Section 70372, subdivision (a)(3) provides as of January 1, 2008: "This construction penalty does not apply to the following: [¶] (A) Any restitution fine. [¶] (B) Any penalty authorized by Section 1464 of the Penal Code or Chapter 12 (commencing with Section 76000) of Title 8."

"Pursuant to recently enacted legislative amendments, the penalty assessment and surcharge provisions cited [in Government Code section 70372] do not apply to restitution fines." (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372.) These amendments operate retroactively. (*Ibid.*; see also *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"].)

D. Sentence Unauthorized

As the above noted authority indicates, the state court construction penalty does not apply to the restitution and parole revocation fines, and this portion of defendant's sentence was unauthorized. (*People v. Walz*, *supra*, 160 Cal.App.4th at p. 1372; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1256-1257.) Although defendant did not object to the penalty, a claim of an unauthorized sentence may be raised at any time. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) We will therefore strike the unauthorized penalty.

V. Cumulative Error

In his conclusory paragraph, defendant contends that the errors of which he complains individually require reversal, and, moreover, since some of the errors are of federal magnitude, the cumulative impact of the errors must be reviewed under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

In examining cumulative error, the critical question is "whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349; accord, *People v. Cain* (1995) 10 Cal.4th 1, 82 [a defendant is entitled to a fair trial, not a perfect one].) A predicate to a claim of cumulative error is a finding of error. Apart from the imposition of a state court construction penalty on defendant's restitution fine, we have found no error. Our review of the record assures us that defendant received due process and a fair trial. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1006.) Therefore, there was no cumulative error requiring reversal.

DISPOSITION

The judgment is modified to strike the construction penalty imposed upon defendant pursuant to Government Code section 70372. In all other respects, the judgment is affirmed. The superior court is directed to amend the abstract of judgment to reflect the modification and to forward a corrected copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST